82-1579

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No._____

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880

HAYFIELD NORTHERN RAILROAD
COMPANY, INC.,
Plaintiff/Appellant,

vs.

CHICAGO and NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant/Appellee,

STATE OF MINNESOTA,
Intervenor/Appellant.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 16, 1982
Filed: December 3, 1982

Before HEANEY, BRIGHT, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

In this case we must decide whether 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when

a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line. We conclude that it does.

I

On January 30, 1981, Chicago and North Western Transportation Company (CNW) filed an application for a certificate of abandonment for its railroad line between Oelwein, Iowa, and Randolph, Minnesota. Several shippers from southern Minnesota (Shippers Group) opposed the abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota, and between Hayfield and Waltham, Minnesota. After an Administrative Law Judge (ALJ) found that the public convenience and necessity permitted abandonment of the entire line, the Shippers Group, pursuant to 49 U.S.C. §10905, made an offer to subsidize operation of the 19.2-mile segment. When the parties could not agree on terms, the Interstate Commerce Commission found that the net liquidation value of the segment was $1,791,354.[1] Shortly thereafter, the Shippers Group withdrew their offer, and, on November 17, 1981, the certificate of abandonment issued.

Soon after making the subsidy offer, the Shippers Group filed an administrative appeal of the ALJ's decision authorizing abandonment. The Commission denied the appeal, and the Shippers Group filed a petition for review in this Court. In early January 1982, after unsuccessfully seeking a stay of the

[1] It was necessary to determine net liquidation value before the amount of the subsidy could be calculated. The subsidy should equal "the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line . . ." 49 U.S.C. §10905(d)(2)(A). One element of the "value of the line" is the net liquidation value of the rail properties on the line. 49 C.F.R. §1121.44(c) (1981).

order permitting abandonment, the Shippers Group withdrew their appeal of the substantive decision.

Meanwhile, CNW made contracts with the State of Iowa and some Iowa shippers which involved improving certain trackage in Iowa. CNW planned to salvage and use the rail from the 19.2-mile segment for this purpose.

On March 31, 1982, members of the Shippers Group formed the Hayfield Northern Railroad Company, Incorporated, which, under Minnesota law,[2] had the power to condemn abandoned rail lines. On the same day, Hayfield Northern filed suit in the Dodge County, Minnesota, District Court, alleging that it wanted to condemn the track, appurtenances, and right of way on the 19.2-mile segment and requesting a temporary restraining order to prevent CNW from removing the property. The state court granted the restraining order.

CNW then removed the suit to the United States District Court for the District of Minnesota,[3] and the State of Minnesota intervened to defend the constitutionality of its condemnation law as applied. The District Court[4] entered summary judgment in favor of CNW, dissolved the restraining order, and dismissed Hayfield Northern's complaint with prejudice, holding that, on the facts presented, 49 U.S.C. §10905 preempts state condemnation procedures.

Hayfield Northern appealed and moved for a stay pending appeal and for an expedited appeal. After argument, this Court granted the motions upon the posting of a $100,000 bond. We now affirm.

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[2] Minn. Stat. Ann. §222.27 (West 1972); Minn. Stat. Ann. §300.04 (West Supp. 1982).

[3] Jurisdiction was based on diversity of citizenship.

[4] The Hon. Paul A. Magnuson, United States District Judge for the District of Minnesota.

II

Two recent Supreme Court cases, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S. Ct. 3014 (1982), and *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982), guide our inquiry into whether Minnesota condemnation law is superseded by §10905. The preemption doctrine is derived from the Supremacy Clause, U.S. Const. art. VI, cl. 2, which reads:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As we observed in *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128 (8th Cir. 1982), the determination whether a state law is "contrary" to a federal statute, and thus preempted, is an inexact task; the answer depends on Congress's intent. Congress may have intended that its enactment foreclose all state legislation on the same subject, or it may have intended to leave the states free to enforce nonconflicting laws and regulations.

Congress's intent to foreclose all state law on the same subject, to "occupy the field," may be express, explicitly stated in the statute, or implied, implicitly contained in the statute's structure and purpose. *Fidelity Federal Savings & Loan Association, supra*, 102 S. Ct. at 3022.

> Absent explicity pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "The Act of Congress may touch a field in which the federal interest is so dominant that the federal system

> will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Ibid. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Without regard to whether Congress intended to foreclose all state legislation on the same subject, "a state statute is void to the extent that it actually conflicts with a valid federal statute . . . ." *MITE Corp., supra*, 102 S. Ct. at 2635. An actual conflict may be found either

> when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Fidelity Federal Savings & Loan Association, supra, 102 S. Ct. at 3022.

Although "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), we hold that the state law authorizing Hayfield Northern to condemn CNW's abandoned railroad line for continuing rail purposes "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Thus, the state law is preempted by §10905.

III

By enacting §10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125, *reprinted in* U.S. Code Cong. & Ad. News 4110, 4157. The statute is carefully tailored to accomplish that purpose, and it makes provision for continued rail service an integral part of the federal abandonment process.

Congress prescribed very precise time limits in §10905. After the Commission decides to authorize abandonment, it must publish its findings in the *Federal Register*. Offers of financial assistance, either to subsidize or to purchase, must be made within ten days following publication. §10905(c). If the Commission determines within fifteen days of publication that the offeror is financially responsible and that the amount of the offer is adequate, issuance of the certificate of abandonment is postponed pending negotiations between the parties. §10905(d). If the parties fail to agree within thirty days after the offer is made, the certificate of abandonment is issued unless either party requests that the Commission establish the conditions and amount of compensation, §10905(e), including the price and terms of any proposed sale, §10905(f)(1)(C). If such a request is made, the Commission must comply within sixty days. §10905(f)(1)(A). The Commission's decision about compensation is binding on both parties, except that the offeror may withdraw its offer within ten days of the decision. §10905(f)(2). Thus, under §10905, any arrangements for continued rail service will be complete within 110 days.

Congress was also concerned with the orderly operation of the line after its transfer. Although a subsidizer may discontinue the subsidy on sixty days' notice, a purchaser may not

transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the transferor carrier for five years after the sale. §10905 (f)(4), (5).

The elaborate procedural detail of this scheme indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981), Congress has also granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments.

IV

To allow Hayfield Northern to use state condemnation proceedings to condemn CNW's right of way and track for purposes of continued rail service would frustrate the accomplishment of Congress's purpose in enacting §10905. For example, the benefits of the 110 day time schedule would be lost, since the state proceedings, once commenced,[5] could take years. Moreover, at the end of the proceedings, Hayfield Northern would have the option to walk away and not pay the award.[6] Although CNW might recover costs and attorneys' fees under Minn. Stat. Ann. §117.195 (west 1977), it could recover consequential damages, if at all, only by bringing a separate lawsuit. See *State v. Savage*, 255 N.W.2d 32 (Minn. 1977). Thus, to allow Hayfield Northern to bring a condemnation action would expose CNW to the "protracted legal proceedings" that the procedure set out in §10905 was designed to avoid.

---

[5] Hayfield Northern has not yet filed its condemnation action, for reasons we do not understand.

[6] Under Minnesota law, a condemnor may abandon the condemnation proceedings at any time before the parties' rights have "vested." See *County of Hennepin v. Mikulay*, 292 Minn. 200, 210-13, 194 N.W.2d 259, 265-67 (1972); *State v. Myhra G.M.C. Truck & Equipment Co.*, 254 Minn. 17, 18-19, 93 N.W.2d 204, 205 (1958).

In addition, to allow Hayfield Northern to condemn the 19.2-mile segment would circumvent the Commission's determination of value. If the Shippers Group wanted to own the line, they could have offered to purchase it, and the Commission, if requested, could set the price and terms of sale. §10905(e), (f)(1)(C). In fact, the Shippers Group chose to offer to subsidize, but even so, the Commission determined the net liquidation value of the line so that the amount of the subsidy could be calculated.[7] We see no reason to allow the Shippers Group, acting through Hayfield Northern, to force CNW to litigate the question of value in a state court when Congress has provided an expedited method by which sale price may be determined, especially when one determination of value has already been made.

V

Hayfield Northern and the State of Minnesota, the appellants, argue that the Commission has recognized that abandoned lines may be condemned under state authority, and that we should "give deference to the interpretation given a statute by the officers or agency charged with its administration." *South Eastern Human Development Corp. v. Schweiker*, 687 F.2d 1150, 1157 (8th Cir. 1982). We do not believe, however, that the Commission has interpreted §10905 in the manner in which the appellants contend.

In *Modern Handcraft, Inc.-Abandonment in Jackson County, Mo.*, 363 I.C.C. 969 (1981), a carrier which owned an eight-mile rail line in Kansas City, Missouri, ceased all rail operations on the line in 1968. In 1980 two noncarriers, an adjacent

[7] See *supra* note 1. Under 49 C.F.R. §1121.44(c) (1981), net liquidation value is determined by calculating the market value of the property for non-rail purposes less costs of disposing of improvements necessary to make the remaining property available for its highest and best use.

landowner and a mass transit organization, applied for a certificate of abandonment on the line. In ruling in favor of the noncarriers, the Commission said,

> We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce. Where as here there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.

Id. at 972. The appellants' reliance on this language is misplaced, however. *Modern Handcraft* involved the possibility of state condemnation of an abandoned rail line for non-rail "public purposes," not for continued rail service. The acquisition of rail property for public purposes is governed by 49 U.S.C. §10906 (Supp. IV 1980), and §10906 does not apply to the acquisition of rail property in order to continue rail service. See *Chicago & North Western Transportation Co.-Abandonment-Between Clintonville & Eland, WI*, 363 I.C.C. 975, 976 (1981). It is unnecessary for us to decide in this case whether condemnation for non-rail public purposes would also be pre-empted by federal law.

The appellants also rely on the rulemaking proceedings in *Ex Parte No. 274 (Sub-No. 6), Abandonment of Railroad Lines and Discontinuance of Service (49 C.F.R. Part 1121)*, 365 I.C.C. 249 (1981). In these proceedings the Commission noted the Association of American Railroads' "concern that prospective State purchasers with condemnation powers might, after obtaining a Commission determination of the value of a line, then seek a more favorable valuation in a condemnation action in a local court," *id.* at 260, but declined to adopt the Association's proposal that a forfeitable bond be re-

quired. This language, however, does not demonstrate that the Commission agreed with the Association's (and the appellants') interpretation of the statute. The appellants also point to the Commission's statement that

> The Commission has been granted only limited jurisdiction to direct a sale; under 49 U.S.C. 10905 we can require a sale, which will *provide continued rail service.* In all other instances, the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are the matters subject to State law.

Id. at 261 (emphasis in original). This pronouncement, however, was made in response to a suggestion that the Commission give lessors of property along the rail line the right of first refusal to buy the property. We do not believe that this language amounts to a declaration that a party who has invoked §10905 may also invoke state condemnation proceedings.

Similarly, we do not believe that *Finance Docket No. 2890F, Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions,* 363 I.C.C 132 (1980), compels a different conclusion. In this proceeding the Commission exempted from regulation the acquisition by a state of rail lines approved for abandonment, when the abandonment has not been consummated. In the course of its discussion the Commission said, "When a rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction. However, when a line has not been fully abandoned, the transfer of the line is subject to our jurisdiction." *Id.* at 135 (footnote omitted). However, the issue here is not one of ICC "jurisdiction." The fact that the Commission may not be able to regulate directly operations

on a line which has been abandoned does not mean that allowing Hayfield Northern to pursue its condemnation action will not substantially frustrate Congress's objectives in enacting §10905.

Hayfield Northern also relies on language appearing in *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982), in which the Seventh Circuit agreed with the Commission that in determining fair market value in connection with a sale price under §10905(f)(1)(A), the value of the property for nonrail purposes was the relevant value. In discussing the abandonment procedures set out in the previous version of §10905,[8] the court indicated that a potential offeror "could . . . wait till the line was abandoned and then reacquire it [by eminent domain] at its nonrail value—or even condemn it before abandonment . . . ." *Id.* at 667. This statement is only a dictum, and does not show that the Seventh Circuit, on full briefing and consideration, would hold that state condemnation laws are consistent with the purpose of §10905. For reasons we have already given, we are persuaded that state condemnation for purposes of continued rail service is not consistent with that statute's aim.

VI

Accordingly, the judgment of the District Court is affirmed, and the cause is remanded to the District Court for a determination of the amount of damages due CNW on account of delay. The stay previously entered by this Court will be dissolved when our mandate issues.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8] 49 U.S.C. §1a(6)(a) (1976), recodified as 49 U.S.C. §10905(b) (Supp. II 1978).

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880-MN September Term, 1982

HAYFIELD NORTHERN RAILROAD,

Appellant,

vs.

CHICAGO NORTHWESTERN
TRANSPORTATION COMPANY,

Appellee,

STATE OF MINNESOTA,

Intervenor-Appellant.

This appeal from the United States District Court for the District of Minnesota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed and remanded to the said District Court for a determination of the amount of damages due CNW on account of delay.

It is further ordered that the stay previously entered by this Court will be dissolved when our mandate issues.

December 3, 1982

(See attached sheet for cost info.)

A True Copy:
ATTEST:
Clerk, U.S. Court of Appeals, Eighth Circuit
2/9/83
Taxation of costs in Case No. 82-1880:
Costs taxed in favor of Appellee:
Costs of reproducing brief and appendix: $167.30

Total costs of Appellee for recovery from Appellant: $167.30

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CIVIL FILE NO. 3-82-376

HAYFIELD NORTHERN RAILROAD CO.,
Plaintiff,

vs.

CHICAGO NORTHWESTERN & PACIFIC RAILROAD CO.,
Defendant,

and

STATE OF MINNESOTA,
Intervenor.

ORDER

Robert S. Abdalian, Esq., and Paul A. Skjervold, Esq., appeared for plaintiffs.

Gilbert S. Buffington, Esq., Special Assistant Attorney General, State of Minnesota, appeared for plaintiff intervenor. Thomas E. Glennon, Esq., appeared for defendant.

This matter came on for hearing before the undersigned on June 4, 1982, upon defendant's motion for dismissal.

Defendant has moved for dismissal of plaintiff's complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. However, under rule 12(b), when matters outside the pleading are offered to and considered by the Court, the motion must be treated as a Rule 56 motion for summary judgment. Defendant here has offered an affidavit in support of its motion. Further, all parties have had reasonable opportunity to present all material pertinent to a summary judgment motion. Accordingly, the Court has considered this motion a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. *See Woods v. Dugan*, 660 F.2d 379 (8th Cir. 1981).

Based upon the pleadings, affidavit, arguments of counsel, the files and proceedings herein, the Court finds that there are no genuine issues of material fact and that the defendant is entitled to judgment in its favor as matter of law.

Plaintiff attempts to use Minnesota condemnation procedures for purposes of continuing rail service over railroad track and right of way in Dodge County, Minnesota. All parties agree that the Interstate Commerce Commission has properly allowed the defendant to abandon that portion of rail. No party questions the authority of the ICC to so act. The Commission's power to regulate abandonment is exclusive and plenary. *Chicago and North Western Transportation Co. v. Kalo Brick*, 450 U.S. 311, 101 S.Ct. 1124 (1981). As part of that abandon-

ment procedure, the Staggers Act of 1980 (49 U.S.C. §10903, *et seq.*) establishes a procedure for continued rail use in connection with abandonment. *See* 49 U.S.C. §10905. Plaintiff in this case admits that it seeks to continue service on the subject rail but attempts to avoid these federally mandated procedures. On the facts of this case, it is clear that federal law has preempted the state law as it applies to procedures seeking continued rail service in connection with an abandonment.

It is true that the Staggers Act is silent as to use of state condemnation procedures. However, the statute is quite clear as to the scheme of continuation of rail service in connection with an abandonment. The plaintiff's use of Minnesota condemnation procedures for purposes of continuing rail service on this abandoned line frustrates the express congressional intent in this area.

The Eighth Circuit Court of Appeals has enunciated a four part test to determine whether state activity in a certain area has been preempted by the federal government. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971).

First, it is clear that the federal government possesses authority to regulate the abandonment and continuation of rail service. *Chicago and North Western v. Kalo Brick*, supra. Secondly, it is clear on the facts in this case that the use of state procedures to ensure continuation of rail service following abandonment inevitably collides with the federal scheme entailed in the Staggers Act. Applying the standards of *Northern States v. Minnesota*, state authority in this area has been preempted.

Accordingly, defendant is entitled to summary judgment in its favor, dismissing plaintiff's complaint and dissolving the temporary restraining order.

Based upon the foregoing,

IT IS ORDERED that:

1. The temporary restraining order entered in this case on March 31, 1982, by Dodge County District Court is dissolved; and

2. Plaintiff's complaint is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 22, 1982.

PAUL A. MAGNUSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 82-1880

HAYFIELD NORTHERN RAILROAD,
Appellant,

vs.

CHICAGO NORTHWESTERN
TRANSPORTATION COMPANY,
Appellee,

STATE OF MINNESOTA,
Intervenor Appellant.

Appeal from the United States District Court for the District of Minnesota.

The Court, having considered joint petition for rehearing and suggestions for rehearing en banc and being now fully ad-

vised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 18, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880 MN
(District Court File
No. 3-82-376)

HAYFIELD NORTHERN RAILROAD
COMPANY, INC.,
Plaintiff/Appellant,

vs.

CHICAGO, NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant/Appellee,

and

STATE OF MINNESOTA,
Plaintiff/Appellant,
Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Hayfield Northern Railroad Company the appellant in this case, and the State of Minnesota, appellant/intervenor, hereby jointly appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Eighth Circuit dated December 3, 1982, rehearing denied by order dated January

18, 1983, affirming the judgment of the United States District Court for the District of Minnesota dated July 22, 1982.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

21 February 1983.

Respectfully submitted,

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APPENDIX F

Title 49 USC § 10905. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Commission—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line; the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within

20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line. Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1405; Pub.L. 96-448, Title IV, § 402(c), Oct. 14, 1980, 94 Stat. 1942.

APPENDIX G

§ *10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation*

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

(c) Repealed. Pub.L. 96-448, Title IV, § 402(a)(2), Oct. 14, 1980, 94 Stat. 1941.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1403; Pub.L. 96-448, Title IV, § 402(a), Oct. 14, 1980, 94 Stat. 1941.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880 September Term, 1982

HAYFIELD NORTHERN RAILROAD,
Appellant,

vs.

CHICAGO NORTHWESTERN
TRANSPORTATION COMPANY,
Appellee.

STATE OF MINNESOTA,
Intervenor Appellant.

Appeal from the United States District Court for the District of Minnesota.

It is now here ordered by the Court that joint motion of appellant and appellant/intervenor to stay the issuance of mandate pending certiorari proceedings to the Supreme Court of the United States is denied.

February 9, 1983

APPENDIX I

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 10, 1983

Robert S. Abdalian, Esq.
103 Omni Building
1652 Greenview Drive, S.W.
P.O. Box 6390
Rochester, Minnesota 55903

RE: Hayfield Northern Railroad Company, Inc., and Minnesota v. Chicago, Northwestern Transportation Company. A-690

Dear Mr. Abdalian:

Your application for a stay in the above-entitled case has been presented to Justice Blackmun, who has endorsed thereon the following:

"Application is Denied
Harry A. Blackmun
Associate Justice
February 10, 1983."

Very truly yours,
ALEXANDER L. STEVAS
Clerk
By KATHERINE DOWNS
Assistant Clerk

gtb
cc: Counsel of record

APPENDIX J

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 22, 1983

Robert S. Abdalian, Esq.
103 Omni Building
1652 Greenview Drive, S.W.
P.O. Box 6390
Rochester, Minnesota 55903

RE: Hayfield Northern Railroad Company, Inc., and Minnesota v. Chicago, Northwestern Transportation Company. A-690

Dear Mr. Abdalian:

Your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

"2/22/83 — Denied
WHR."

Very truly yours,
ALEXANDER L. STEVAS
Clerk
By KATHERINE DOWNS
Assistant Clerk

gtb
cc: Counsel of record

APPENDIX K

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

March 7, 1983

Robert S. Abdalian, Esq.
Ward, Gray & Oehler, Ltd.
P.O. Box 6390
Rochester, Minnesota 55903

RE: Hayfield Northern Railroad Company, Inc., et al. v. Chicago Northwestern Transportation Co. A-690

Dear Mr. Abdalian:

The Court today entered the following order in the above-entitled case:

"The application for stay addressed to Justice Marshall and referred to the Court is denied."

Very truly yours,
ALEXANDER L. STEVAS
Clerk
By FRANCIS J. LORSON
Chief Deputy Clerk

rjb

cc: Counsel of record
Robert D. St. Vrain, Esq., Clerk, U. S. Court of Appeals for the Eighth Circuit (Your No. 82-1880)
Robert E. Hess, Esq., Clerk, U. S. District Court for the District of Minnesota (Your No. 3-82-376)

APPENDIX L

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. A-690

HAYFIELD NORTHERN RAILROAD CO., INC.
AND STATE OF MINNESOTA
vs.
CHICAGO, NORTHWESTERN TRANSPORTATION CO.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the request of Justice Rehnquist for the view of the United States.

The court of appeals has decided an important issue of federal law that implicates the interests of several federal agencies and involves delicate questions of federalism. The Interstate Commerce Commission, which is the federal agency empowered to administer the provisions of the Staggers Act under which this case arises, see 49 U.S.C. (Supp. IV) 10901 *et seq.*, did determine that it would not intervene or make a submission in the lower courts in this case, because it concluded that the Commission's jurisdiction and responsibilities are not threatened or adversely affected by this litigation. However, to date the Commission has not formally taken a position on the question whether Section 10905 of the Act preempts condemnation statutes such as the Minnesota statute in this case. Further, there are other federal agencies, including the Urban Mass Transportation Administration and the

Department of the Interior, that are involved in efforts by municipalities and other political subdivisions to acquire abandoned rail lines for conversion to public purposes. The issues raised by the court of appeals' decision also may implicate the interests of the Federal Railroad Administration, which currently is in the process of negotiating the sale of assets of the Consolidated Rail Corporation, which may include abandoned rail lines, to private buyers.

In view of the complexity and importance of the substantive issues considered by the court of appeals, it has not been possible to arrive at any considered judgment about them in the short time available to us. Further, we have not been able to obtain and coordinate the views of the various federal agencies whose programs may be affected by the decision of the court of appeals.

It would not be appropriate for the United States to comment on the competing equities among the private parties that are put into question by the application for a stay. However, we would point out that if a stay were granted at least until a jurisdictional statement and an answering brief were filed. we would be in a better position to evaluate both the interests of the United States in the case and the proper resolution of the important substantive issues of federalism raised by the decision of the court of appeals.

Respectfully submitted.

REX E. LEE
Solicitor General

February 1983.

APPENDIX M

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 274 (SUB-NO. 6)

ABANDONMENT OF RAILROAD LINES AND
DISCONTINUANCE OF SERVICE
(49 C.F.R. Part 1121)

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

JAMES I. COLLIER, JR.
Attorney for the
Association of American
Railroads
1920 L Street, N.W.
Washington, D.C. 20036
Due Date: December 26, 1980

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 274 (SUB-NO. 6)

ABANDONMENT OF RAILROAD LINES AND
DISCONTINUANCE OF SERVICE
(49 C.F.R. Part 1121)

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR), on behalf of its member railroads,[1] respectfully submits the following comments in response to the Commission's Notice of Interim Rules and Request for Comments served on November 25, 1980, and published on the same date in the *Federal Register* at pages 78144-78151. By its Notice the Commission has established interim rules, and is seeking comments on such rules as permanent rules, to implement Section 402 of the Staggers Rail Act of 1980, Pub. L. 96-448. The most significant changes in the law affecting abandonments are the new deadlines for the Commission to render decisions on abandonment applications. The Staggers Act clearly reflects Congressional intent to speed up the Commission's abandonment and discontinuance processes.

Congress also has provided the Commission with the discretion whether to investigate or not to investigate applications for abandonment or discontinuance, and in doing so directed the Commission to make an initial determination whether or not the pleadings at the application and protest stage require any further proceedings. This mandate to the Commission to determine whether or not to investigate an abandonment requires only an analysis of the application and protest data, and precludes the use of modified procedure for such determination.

In order to make this initial determination the Commission should have before it protests containing specific and sufficient information to rebut the detailed and verified data re-

[1] These comments are filed on behalf of member railroads which are not filing individual comments in this proceeding.

quired in an abandonment or discontinuance application. Too often in the past the Commission has entertained protests of a general and nonspecific nature which led to modified or oral proceedings which often dragged on for a year or more with no public or administrative purpose being served. In order to avoid these kinds of situations, Congress has now directed the Commission to make an initial determination whether to investigate or not to investigate. This mandate, coupled with the procedures now applicable following an authorized abandonment whereby those who are interested in preserving uneconomic rail service for local benefits have an opportunity to acquire or to subsidize the continued operations of the line, and the Commission's new authority to set the purchase price (Ex Parte No. 395), reflects Congressional determination that local interests will be amply protected in the event of the Commission's determination not to investigate.

RECOMMENDED AMENDMENTS TO THE RULES

Section 1121.36(a)(1)(iii).

This section requires "[s]pecific reason(s) for opposing the abandonment or discontinuance, including information with respect to protestants' reliance on the involved service . . ." Just "information" is too general—more specific data from shippers and others who have a desire to express their interest must be required. Specific data is necessary to assist the Commission in its determination whether to investigate or not to investigate. It is the AAR's view that normal shipper information required in the Commission's usual order regarding modified procedure should be required. For example, the number of carloads shipped or received; the names and extent of usage of motor carriers; information regarding the capacities of the plant—whether it be a fertilizer operator, grain elevator, or other; the nature of the business of the protestant;

the extent to which the protestant uses for-hire or private trucking; the commodities and/or services dealt in by the protestant; modes and methods of transportation to be used if the line is abandoned; etc. By requiring this "information" at the protest stage, the Commission would have a better and more detailed picture of the interests of protestants for making the determination directed by Congress.

If the Commission adopts this recommendation for more specific information, an amendment would be required in §1121.31. The notice of abandonment should contain reference to the required information by any protestant with the following language included:

> Persons who wish to file a protest are cautioned that they must observe the above designated requirements of the Commission. Failure to do so may result in the Commission's rejecting the protest, or in the alternative determining not to investigate the abandonment.

The requirement that any person desiring to protest an application must provide specific information is consistent with the new authority provided to the Commission to investigate or not to investigate applications. As the Commission well knows, detailed factual data is required of the carriers in filing such applications. There is no valid reason for the Commission to make its determination whether to investigate or not to investigate on general and nonspecific information in protests. Any protestant who continues to file such protests should do so at its peril in light of the Congressional intent for the Commission to expedite the abandonment procedures. *Section 1121.36(c)(1).*

In light of the Congressional intent to expedite abandonment proceedings, the AAR also recommends that this section be amended to require that conforming protests be filed with

the Deputy Director of the Section of Finance and served upon the applicant by expedited mail within 30 days of the filing of an abandonment application. The applicant should be permitted 5 days from the date of receipt of the written comments or conforming protests within which to file a reply with the Commission. This would give the Commission a minimum of 10 days within which to determine whether to investigate or not to investigate based on data contained in the application, verified protests (containing specific information), and replies thereto.

Section 1121.36(d)(4).

This section provides that no motions to strike or requests for cross-examination would be permitted under modified procedure. No doubt the underlying reasons for the Commission's determination not to allow motions to strike or cross-examination in connection with modified procedure arise in part from the expedited timetable involved. In part, the no-strike or cross-examination provision could also arise from a perception by the Commission that the emphasis has somewhat been shifted from disagreement over factual issues involving the substance of an abandonment to the more relaxed exit philosophy expressed by Congress in the Staggers Act. It should be remembered, however, that the proceedings involved in abandonment cases are not in the nature of rulemaking, but are in the nature of quasi-adjudicative proceedings dealing with specific facts and issues involving a specific line, a specific railroad and specific protestants.

Meaningful modified procedure requires that misleading, irrelevant, and improper data, and indeed data that does not comply with the rules of evidence, be stricken. Due process of law requires no less. Therefore, we believe that §1121.36 (d)(4) should be amended to allow for motions to strike and, where appropriate, cross-examination. If the Commission as-

signs a matter for modified procedure, the full safeguards of the Administrative Procedures Act require that motions to strike and, in appropriate cases, requests for cross-examination be allowed. These safeguards are even more necessary when it is remembered that abandonments, much like the passenger discontinuance cases of old, often involve a good deal of emotional diatribe not calculated to define and develop issues.

Section 1121.36(d)(5)(B)(ii).

This section should be clarified so as to assure the parties that cross-examination of protestants' witnesses by applicant's attorney at any oral proceeding would be allowed. This section provides that oral hearings shall be for the primary purpose of cross-examination of witnesses filing verified statements pursuant to §1121.36(b)(5)(A), which is applicable only to applicant's initial verified statements and *not* to protestants' verified statements. Thus, counsel for the applicant could technically be denied the right of cross-examination during oral hearings. The AAR does not believe that this result was the intent of the Commission, and the rule ought to be amended.

Section 1121.38(c)(1)(i).

In connection with the filing of offers, the Commission's proposed rule should require that any offer filed prior to an administratively final decision authorizing abandonment should be refiled in accordance with §1121.38(c)(1)(ii) to start the time requirements running in accordance with the deadlines provided for under the Staggers Act. While early offers are obviously to be encouraged, nevertheless the Staggers Act provides certain time frames within which the Commission must act following an administratively final decision authorizing abandonment. In order to set those time limitations any offer that was filed prior to an administrative final

decision authorizing abandonment should be refiled to set the procedural mechanisms in motion. Refiling would also be of assistance to the Commission in its docketing procedures, so that it would be aware of the time limits and the running of the various time frames for various determinations following the administratively final decision authorizing the abandonment.

Section 1121.38.

The AAR recommends changes in the requirements of offers for financial assistance when a state or state agency is involved. We pointed out in the industry's recent Comments in Ex Parte No. 395, that some states have available to them various condemnation procedures which would in effect provide for the same results as do the federal regulations. Nothing prevents a state from exercising its rights under the Staggers Act and then walking away from the proceeding or decision of the Commission regarding the valuation or purchase price, and beginning a condemnation proceeding in a local state court seeking favorable treatment by such court. Indeed, the statute itself allows a state or state agency to walk away from a Commission determination on value for purposes of acquisition. The State of Wisconsin, for example, under pre-existing regulations refused to agree to a carrier determination of purchase price, notwithstanding the fact that price was the salvage value placed in the record by the carrier and upon which certain costs were calculated in accordance with the Commission regulations. After the six-month provision lapsed, the state commenced a condemnation action in a local court seeking a more favorable valuation than the carrier presented to the Commission. Nothing exists to prevent this kind of activity under the Staggers Act. However, the Commission could do something about it with its wide discretion in promulgating its rules and regulations.

Therefore, it is recommended that in connection with financial offers of assistance or purchase under §1121.38, the Commission should require that the offeror indicate whether or not it is a state or state agency and whether or not it has condemnation powers. If so, as recommended in Ex Parte No. 395, the offer must be accompanied by a 25 percent payment to the carrier of the estimated purchase price which may be retained by the carrier in the event the state or state agency offeror declines to exercise its rights under a Commission determination of value. The rule also should provide that such deposit shall not be considered as a prepayment for any value determined by any subsequent condemnation procedure commenced by the state or state agency in state or federal courts. *Section 1121.38(m)(2).*

Essentially, this provision states that if a carrier is dealing with one of several offerors and neither the applicant or the present offeror invokes the Commission's jurisdiction for determination of purchase or subsidy, the second offeror then has 10 days additional after the initial 30-day period to invoke the Commission's jurisdiction. This rule is not based upon on any provision in the Staggers Act, and there is no other basis in law for such a rule. Indeed, in light of the strict time requirements imposed by Congress such a provision would be contrary to Congressional intent. The only option available for multiple offerors to invoke is for one of them to invoke the Commission's jurisdiction within the time frame prescribed, regardless of whether or not the carrier is dealing with that particular offeror at the moment. The purchase price determination would be applicable regardless of what offeror became the actual owner.
Section 1121.38(m)(3).

The industry believes that the 20-day provision is excessive. The statute provides an offeror with an option to walk away

within 10 days of the Commission decision. No sound reason, administrative or otherwise, exists for doubling that time. By the tenth day both the Commission and the applicant will be aware of whether or not the offeror intends to exercise the purchase price determination by the Commission.

Section 1121.38(p).

Congress did not contemplate nor does the Act require that a carrier and purchaser enter into a creditor-debtor relationship. Nowhere in the Act, Conference Report or Committee comments is there any condition for the price of eliminating burdens on commerce to be paid by a forced debtor-creditor relationship. A carrier runs a substantial risk of having a non-state applicant default on its payments, particularly where the Commission's financial responsibility regulations, as administered in the past, tend to be rather lenient. In light of the bankruptcies of several carriers, and in light of the difficulties encountered in collecting debts in bankruptcy proceedings, the Commission cannot require a forced debtor-creditor relationship between an applicant and a proposed purchaser. There is no statutory basis for imposing the risk of a defaulting purchaser upon a carrier.

We are not dealing here with inconsequential matters, for what is at issue is the sale and ownership of property, both real and personal. In this light the following change in §1121.38(c) is recommended:

Section 1121.38(c)(2)(iii).

This section should be amended to provide that the offeror indicate by clear and convincing evidence that it has or within a short, reasonable period will have the financial resources to pay cash or the cash equivalent for the net liquidation value of the line as contained in applicant's salvage statements submitted in its application. This requirement would not prejudge the valuation of the line but would provide some assurance

that any prospective offeror has the ability to make a cash payment of a substantial amount to avoid a forced debtor-creditor relationship upon the applicant as a condition of eliminating a burden on commerce.

"Binding" Commission Decision of Value.

The abandonment provisions of the Staggers Act, particularly those sections that deal with Commission authority to set purchase price valuation following administrative determination of abandonment, in effect make the Commission a legislative condemnation tribunal. Such authority is generally unknown under our system of goverment. Issues relating to the legality of such authority are not appropriate matters for argument before the Commission. However, the language of the Staggers Act relating to the Commission's determination of a value being binding does not mean that an aggrieved carrier who believes its property has not been properly valued by any such decision does not have the right of appeal. The industry believes and the legislative history supports the inference that such language meant that the binding nature of the decision relates only to price.

The recommendations made herein by the AAR are in no way intended to indicate that any rail carrier has waived any of its rights with respect to the legality of the statute or any future Commission determination thereunder. The recommendations have been made to facilitate the Commission's administrative process under the proposed rules.

Respectfully submitted,

JAMES I. COLLIER, JR.
Attorney for the
Association of American
Railroads
1920 L Street, N.W.
Washington, D.C. 20036

Due Date: December 26, 1980.

APPENDIX N

OFFICE OF THE GENERAL COUNSEL

No. 82-166 April 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB 1 (Sub-No. 113)F, Chicago & North Western Transportation Co. —Abandonment Between Oelwein, Iowa and Randolph, Minnesota.

On April 5, 1981, Assistant General Counsel Stuart F. Gasner of the Chicago and North Western Transportation Company ("CNW") wrote to you and to me to ask the Commission to intervene in a case in federal district court that is related to the Commission's decision authorizing CNW to abandon a branch line in Minnesota and Iowa.[1] The purpose of this memorandum is to advise you that we recommend against the Commission's participation. We reach this conclusion for two reasons. First, we do not believe that CNW's position—that federal law (49 U.S.C. 10905) preempts condemnation of the branch line under state law after the issuance of a certificate of abandonment—is correct. Second, we see no substantial interest within the jurisdiction of the Commission which would

[1] Docket No. AB 1(Sub-No. 113)F, Chicago & North Western Transportation Co.—Abandonment Between Oelwein, Iowa and Randolph, Minnesota, served October 9, 1981, petition for review dismissed sub nom., *Brownsdale Cooperative Ass'n, et al. v. ICC*, No. 81-2333 (8th Cir. January 14, 1982) (circulated in G.C. Memorandum No. 82-18).

I have sent a letter to Mr. Gassner informing him that his request that the Commission participate in the new district court case is under consideration.

warrant our intrusion into this sensitive area of federal-state relations. Accordingly, we recommend that the district court resolve the issue without the participation of the Commission.

FACTS

In January 1981, CNW applied for authority to abandon a 44 mile branch line in Minnesota and Iowa. In July 1981, an Administrative Law Judge granted the application. Protestants that were shippers on the Minnesota segment of the line appealed the ALJ's decision insofar as it authorized abandonment of a 19 mile segment in Minnesota.

Pursuant to 49 U.S.C. 10905, the Minnesota shippers made an offer of subsidy for the 19 mile segment. Under that section, if the Commission finds that the subsidy offer or purchase price offer of a financially responsible person meets the standards of 49 U.S.C. 10905(d), it postpones the issuance of a certificate of abandonment. The parties may request the Commission to determine the purchase price or the conditions and amount of subsidy. The Commission's decision is binding, except that the person who offered the subsidy or purchase may withdraw his offer within ten days of the Commission's decision. 49 U.S.C. 10905(f).

In October 1981, the Commission affirmed the ALJ's decision. It withheld the certificate of abandonment while the Minnesota shippers' subsidy offer was pending. On request, the Commission determined that the subsidy should be $360,000 annually and that the 19 mile segment was worth $1.5 million. The Minnesota shippers thereafter withdrew their subsidy offer.

In November 1981, the Commission issued the certificate of abandonment. The Minnesota shippers filed a petition for judicial review. The Commission denied the shippers' request for a stay pending judicial review. The shippers thereafter

sought a stay pending review in the United States Court of Appeals for the Eighth Circuit, which also denied the request.

CNW effected abandonment on December 17, 1981. The Minnesota shippers subsequently voluntarily sought dismissal of their petition for review in the Eighth Circuit, which granted dismissal on January 14, 1982.

On March 31, 1982, the Minnesota shippers formed a corporation, the Hayfield & Northern Railway Company ("H &N"). H&N filed a condemnation action under state law in a Minnesota state court, seeking to condemn the 19 mile segment for continued use as a railroad. H&N also sought a temporary restraining order ("TRO") preventing CNW from removing the rail, ties, and bridges on the segment pending the condemnation action. On April 2, 1982, the state court granted the TRO. Pursuant to 28 U.S.C. 1441, CNW removed the condemnation action to the United States District Court for the District of Minnesota, Civ. No. 3-82-376.

CNW stated in its letter that it has negotiated a contract to sell the rail from this abandoned line to the State of Iowa for use in a project to upgrade track near Ames, Iowa. CNW also informed me that it has negotiated a lease for a small portion of the 19 mile segment to Cargill, Inc. the TRO interferes with these agreements.

CNW's request that the Commission intervene

CNW believes that 49 U.S.C. 10905 provides the exclusive means by which parties may continue rail service on a line that a railroad has been authorized to abandon. It argued unsuccessfully in the state court TRO hearing that Section 10905 preempts the state condemnation proceeding and that the proceeding is an improper collateral attack on the Commission's determination of the line's value.

CNW stated that it expects the Attorney General of Minnesota to intervene on behalf of the shippers and has asked the

Commission to intervene on behalf of CNW's position that federal law (49 U.S.C. 10905) preempts the condemnation action based on state law.

DISCUSSION

There is some appeal to CNW's argument that Section 10905 provides the exclusive means by which a party may continue rail service in lieu of abandonment, and thus preempts a state law condemnation action even after abandonment has occurred. However, we believe the shippers have the best of the argument, and that once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation.[2]

It is well settled that the states may exercise concurrent or independent powers with the federal government unless: (1) the Constitution places the power exclusively in the federal government; (2) the power given the federal government is prohibited to the states; or (3) by its nature and subject, the power must be exercised by the national government. *Gilmann v. Philadelphia*, 70 U.S. (3 Wall.) 713, 730 (1865). In examining situations in which federal and state laws may conflict, the courts attempt to reconcile the operation of both statutory schemes rather than hold the state action to be preempted. See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). When the federal government has not specifically precluded state legislation in a certain area, a state may exercise its power to regulate a subject within that area which is local in nature (as opposed to national and requiring uniform rules), so long as its regulation is not unduly burdensome on interstate commerce. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960). Of course, to the extent federal and

[2] We have no doubt that prior to the issuance of a certificate of abandonment a state condemnation action will not lie.

state laws or regulations are inconsistent, the constitutional act of Congress supersedes all inconsistent state legislation. U.S. CONST. art. 6; see *Huron Portland, supra*, 362 U.S. at 442.

In the Supreme Court's view, the state condemnation statute should be read so as not to conflict with the federal statute—49 U.S.C. 10905. In this case, it is possible to view the state statute providing a condemnation action as not conflicting with Section 10905. Section 10905 proceedings end when the certificate of abandonment issues and abandonment occurs. Where, as here, a party files a condemnation action after a rail line has been abandoned, the action under state law does not interfere with the Commission's determination under Section 10905.

CNW argues that in this case, if the district court (acting under state law) sets a value for the line that is lower than the purchase price that the Commission established, then the action based on state law would conflict with the federal statute, 49 U.S.C. 10905. We disagree.

10905 (F)(1)(C) that when the Commission establishes a purchase price under Section 10905, "[i]n no case shall the Commission set a price which is below the fair market value of the line . . ." Section 10905 can be read as obligating only the Commission (and not a court) to set a price at a certain level when a party invokes Section 10905 to avoid abandonment. A court need not set the same price when it later determines value under a state condemnation statute after the line in question has been abandoned.[3] Nor does an injunction re-

[3] There are good reasons for a court, acting under state law, to set a different value for the line than the Commission. Under Section 10905, the Commission determines the fair market value of a line that is in service. After abandonment occurs, the shippers on the

quiring the premises which are the subject of the condemnation proceeding to be kept intact pending the outcome of that proceeding interfere with Commission jurisdiction so long as it does not impose any obligation upon the railroad to continue operations over a line which the Commission has authorized the railroad to abandon. The Commission has in other contexts advised states desiring to condemn rail property for non-rail use that the proper course is to obtain a certificate authorizing abandonment from the Commission prior to instituting condemnation proceedings. We see no reason to arrive at a different result because condemnation is sought for rail purposes and the parties seeking to effect the condemnation have previously resorted to the procedures set out in Section 10905.

In view of the Supreme Court's direction to read federal and state statutes so as to avoid a conflict, we conclude that a prior resort to Section 10905 does not preempt a condemnation action under state law after the Section 10905 procedures have been exhausted and the line abandoned. The federal district court undoubtedly is aware of the doctrine of preemption and can reach the correct result without the Commission's participation.

I note, however, that the Commission has addressed the preemption issue in a different context in language that could be read to apply to this case. In Ex Parte No. 395, *Feeder Railroad Development Program*, 365 I.C.C. 93 (1981), the Commission promulgated rules to implement Section 401 of the

---

line may have turned to other means of transportation, and the constitutional value of the line may therefore be lower than the price the Commission set. The state condemnation statute may also incorporate a valuation standard which leads to a higher price than Section 10905's "fair market value" standard. See, *e.g.*, *In Re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 285 N.Y.S. 2d 24, 231 N.E. 2d 734 (1967), *cert. denied*, 390 U.S. 1002 (1968).

Staggers Act. That section added new 49 U.S.C. 10910, which provides that upon the application of a financially responsible person, the Commission may require the rail carrier that owns a rail line to sell the line "at a price not less than the constitutional minimum value." The provision applies in two cases: (1) when the public convenience and necessity require or permit the sale of the line, or (2) when a rail line has been placed on a system diagram map but before the rail carrier has filed an application to abandon the line. See 49 U.S.C. 10910(b).

The Commission stated in the text accompanying the rules that when a party invokes the feeder rail development procedure, then a state condemnation proceeding will not lie:

> The Association of American Railroads (AAR) is concerned that a prospective state purchaser dissatisfied with our valuation of the property could "walk away" from the proceeding and start a condemnation proceeding under that state's jurisdiction with the hope of obtaining a more favorable determination of value by a local court.
>
> States may not exercise eminent domain powers as a vehicle to circumvent a federally-mandated statutory scheme under which we are granted exclusive jurisdiction to require a railroad to cease operations over one of its rail lines or to transfer the line to a new operator. *There is no legal capacity in any state to alter the status of a common carrier* insofar as its interstate obligations are concerned; such capacity lies wholly within the federal jurisdiction. * * *
>
> Upon invoking our jurisdiction, the party's only remedy if dissatisfied is to seek judicial review in a United States Court of Appeals pursuant to 28 U.S.C. 2321a and 2342 * * * (Emphasis added).

CNW indicated to us that it views the quoted language as giving the Commission's analysis that a state condemnation action will not lie if a party invoked the Commission's determination of a subsidy under 49 U.S.C. 10905. The Ex Parte 395 decision by its terms, however, applies only to proceedings invoked under 49 U.S.C. 10910—the feeder rail development provision.

We believe that there is a good reason to view the Ex Parte No. 395 language as not applying to this case. In the quoted section of the decision, the Commission showed its concern that a state may not alter the status of a "common carrier." Once a rail carrier has abandoned a line, it no longer is a common carrier subject to Commission jurisdiction as to that line. Therefore, a state condemnation action that occurs after a carrier abandoned a line would not alter the carrier's status as a common carrier. If service is to be reinstated over the line following its acquisition by condemnation, a certificate would have to be obtained by the new operator under 49 U.S.C. 10901.

CONCLUSION

We recommend that the Commission not participate in the district court condemnation action. If, however, the Commission wishes to participate, we recommend that it authorize us to take the position that a Commission decision under Section 10905 establishing a subsidy or purchase price for purposes of that section does not preempt a subsequent condemnation proceeding under state law. CNW intends to file a motion to dismiss the condemnation action, based on its theory that federal law preempts the action, during the week of April 26. Accordingly, we request that you advise us of the Commission vote on whether to participate by May 4, 1982. We will inform Mr. Gassner by letter of the Commission's decision and, if the decision is to participate, take the necessary steps to secure our participation.

Sufficient copies are attached to allow distribution to the entire Commission.

JOHN BROADLEY
General Counsel

Attachments
cc: Director Hardy
Acting Deputy Director Gitomer
Clearance Unit

APPENDIX O

OFFICE OF THE GENERAL COUNSEL

No. 82-524 December 22, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880
(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.—Abandonment Between Oelwein, Iowa and Randolph, Minnesota)
Prior G.C. Memoranda Nos. 82-166 to 82-323

This is to inform the Commission of a decision in which the United States Court of Appeals for the Eighth Circuit held that 49 U.S.C. 10905—the provision of the Act for offers of assistance to avoid abandonment—preempts a court action under state law to condemn for continued railroad use a rail line that was abandoned pursuant to a Commission decision.[1]

BACKGROUND

After the Commission authorized the Chicago and North Western Transportation Company ("CNW") to abandon a

[1] When the Commission voted not to participate in this court action, it asked that we inform it of significant developments.

144-mile branch line in Minnesota and Iowa, certain Minnesota shippers made an offer of subsidy pursuant to 49 U.S.C. 10905 for a segment of the line.[2] On the shippers' request, the Commission calculated the net salvage value of the segment in order to to establish the subsidy terms. The shippers thereafter withdrew their subsidy offer, the certificate of abandonment issued, and CNW ceased operations on the line.

After operations ceased, the Minnesota shippers filed an action under state law to condemn the segment for continued use as a railroad. The district court dismissed the action on the ground that Section 10905 preempts a subsequent state law condemnation action for purposes of continued rail service because the Commission's power over rail abandonments is exclusive and the condemnation action interfered with that power (see prior G.C. Memorandum No. 82-323).

THE COURT OF APPEALS DECISION

The Court of Appeals affirmed the district court. It is significant to note that the court did not find preemption based on the fact that the Minnesota Shippers had invoked Section 10905 by offering to subsidize the line. Rather, the Court held that the existence of Section 10905 preempts a state law authorizing condemnation of an abandoned rail line for continued railroad purposes (slip op. 5).

The Court found (slip op. 7) that the "elaborate procedural detail" of section 10905 indicates that Congress "granted the Commission exclusive and plenary authority to provide for

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[2] Under Section 10905, a financially responsible person may offer to subsidize or purchase a line that the Commission has authorized the railroad to abandon. If the offeror and the railroad cannot agree on terms, either may request the Commission to establish them. 49 U.S.C. 10905(e). The agency's terms are binding except that the offeror may withdraw its offer within ten days. 49 U.S.C. 10905(f)(2).

continuation of rail service in connection with abandonments." The court reasoned that state law condemnation proceedings, which are often lengthy, would interfere with the explicit time limits in Section 10905 for disposing of offers to purchase or subsidize lines about to be abandoned (slip op. 7).[3] The court noted (id.) that in enacting Section 10905, Congress intended to avoid such protracted legal proceedings. The court also found that the state law condemnation action would circumvent the Commission's determination of the value of the line (slip op. 8).

In a lengthy discussion of Commission decisions (slip op. 8-11), the court rejected the Minnesota shippers' argument that the Commission has recognized that abandoned lines may be condemned under state law. The court found (slip op. 9) that the agency's decision in *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I.C.C. 969 (1981) involved the possibility of a state law condemnation of an abandoned rail line for non-rail public purposes, which is governed by Section 10906 rather than Section 10905. The court did not rule on whether condemnation for non-rail public purposes would also be preempted by federal law.

The decision is another in a line of cases, including *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), in which courts have held that the Commission's power over rail abandonment is exclusive and plenary.

INTERVENTION REQUESTS

In prior G. C. memorandum No. 82-166, we recommended that the Commission did not intervene in this case before the

[3] The court calculated (slip op. 6) that under the time limits of Section 10905, any arrangements for continued rail service will be complete within 110 days.

district court in behalf of CNW's view that Section 10905 preempts a state law condemnation action for continued rail use. We continue to believe that a reasonable case can be made that the existence of Section 10905 does not preempt all such state law actions.

The Eighth Circuit's opinion appears to be contrary to the philosophy of a recent decision of the District of Columbia Circuit that affirmed the Commission's modified certificate program allowing states and their contractors to start and terminate rail service without Commission approval, *Patrick W. Simmons v. ICC*, No. 81-2009 (D.C. Cir., Dec. 14, 1982).[4] The *Simmons* court noted that states have strong interests in retaining local rail service. The Eighth Circuit's opinion that Section 10905 preempts a state law condemnation action for continued rail service could become an obstacle, in some situations, to retaining local rail service because it prevents a private entity such as HN from using a state law to condemn a rail line for continued rail use.

HN will seek rehearing of the Eighth Circuit's decision. Several states have informed us that they intend to support HN's request and have asked the Commission similarly to support it. We recommend that the Commission not intervene in support of the petition for rehearing. We have remained neutral to this point and do not believe that intervention is wise unless there are compelling reasons why the Eighth Circuit's decision will cause problems for the Commission. We understand that the Office of Procedures believes that the decision will pose problems. They will submit their views directly to the Commission. Whatever those problems are, they should be weighed against the problems for the Commission

[4] The Simmons decision will be circulated in the near future.

and the railroads, pointed out by the Eighth Circuit, in having protracted condemnation proceedings interfering with Commission proceedings.

Should the Commission disagree with our recommendation not to intervene and wish to support the petition for rehearing, it should inform us on December 27, 1982, which is the date for HN's filing its petition for rehearing.

Sufficient copies are attached for distribution to the Commission.

JOHN BROADLEY
General Counsel

Attachments
cc: Director Hardy
Director Gitomer
Attorney W. Michel
Clearance Unit

APPENDIX P

OFFICE OF PROCEEDINGS
HAYFIELD NORTHERN RAILROAD CO., INC. v. CHICAGO AND NORTH WESTERN TRANSPORTATION CO., U.S.C.A. 8th Cir., NO. 82-1880.
(RELATES TO DOCKET NO. AB-1 (SUB-NO. 113F), CHICAGO AND NORTH WESTERN TRANSPORTATION CO.-ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA)
SEE G. C. MEMORANDA NOS. 82-524, 82-323 AND 82-166.

December 27, 1982

MEMORANDUM TO THE COMMISSION:

On December 3, 1982, the Eighth Circuit issued a decision finding that the offer of financial assistance procedures of 49 U.S.C. 10905 preempt State condemnation laws used to com-

demn rail properties after abandonment in order to continue rail service. The decision grew out of an attempt by a Minnesota railroad company to comdemn Chicago and North Western Transportation Company's (CNW) abandoned rail property for continued rail use.

At the time the suit was filed CNW requested the Commission to intervene on its behalf. The Office of the General Counsel recommended against intervention for two reasons: (1) it disagreed with CNW's argument that federal law preempts condemnation under State law *after* abandonment; and (2) it expressed the view that there was not enough Commission interest in the case to warrant intrusion into the "sensitive area of federal-state relations". This office shared those views.

Since the Court's decision finding in favor of CNW the Commission has again been asked to intervene; this time by State interests seeking to have the decision overturned. The Office still thinks there is not Federal preemption under these circumstances, but does not recommend Commission intervention. Instead, this memorandum is to inform the Commission of the probable impact of the Court's decision an to the Commission's jurisdiction under 49 U.S.C. 10905. Preliminarily the Court's decision appears to be contrary to the intent of section 10905 that local shippers and communities to be allowed to acquire rail properties for continued rail service. Section 10905 set forth an extensive statutory plan for such sales *before* abandonment becomes effective, but there is nothing in the statute to suggest a federal interest in the property once abandonment is consummated. As a result, a state condemnation action will lie only after the carrier has ceased service. Thus, the only harm to a carrier by a forced sale after abandonment is the opportunity cost of keeping the assets on the line while the condemnation action proceeds. It

appears that this problem can be easily remedied by the *States* requiring a bond or by adding opportunity cost damages, if any, to a condemnation award. However, there appears to be *no* Federal interest in the property once it is abandoned. Thus, section 10905 should not preempt State condemnations.

This decision may also impact on the Commission's handling of section 10905 proceedings. For example, a party seeking primarily to subsidize operations also may also offer to purchase the line concurrently with its subsidy offer. If it does not, it may be faced with either accepting the subsidy terms or buying the line from the carrier at whatever price the carrier sets (Congress acknowledged the problems of this later option by establishing the forced sale provisions in section 10905 and the feeder line provision 49 U.S.C. 10910). However, if the offeror makes both a purchase and subsidy offer, and the Commission does not require a choice between the two options as it currently does, the Commission will be required to set terms in two different types of cases. Another result of the Court's decision may increase the Commission's workload, without increasing the time in which the Commission must perform its analysis.

Another problem concerns rail banking. Under this concept, numerous states have been acquiring abandoned rail properties through condemnation for future rail use. The Court's decision appears to preempt the use of State condemnation law for acquisition of rail properties for rail banking—even though the Commission has held that section 10905 offers for rail banking would not be considered. If, on the other hand, State condemnation laws could be used to acquire properties for rail banking, States are encourged to tell the Commission and Courts that they are using their condemnation power for rail banking, and then immediately put the acquired property to rail.

Similarly, the Commission has no jurisdiction to consider a section 10905 offer to acquire a spur line. If the Court's decision is read broadly, the State could not condemn such property, and there would be no means, absent private negotiations, for shippers and communities to readily acquire spur trackage.

A final issue concerns the length of the preemption. It is not uncommon for abandoned track to remain in place for months prior to salvage. If that situation prevails, are we to assume that a State could not condemn that property for rail use months after abandonment is effectuated?

In conclusion, the problems with the Court's decision arise out of the Court's failure to distinguish pre-consummation actions from post-consummation actions. It is our opinion that following consummation of an abandonment, there is *no* remaining Federal interest in the line (unless certain conditions were imposed) and State laws, providing for condemnation so that communities and shippers retain rail service, should be favored.

HEBER P. HARDY
Director
RICHARD LEWIS
Associate Director

APPENDIX Q

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

February 18, 1983

Mr. Paul Bator
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

Re: Hayfield & Northern Railroad Co., Inc. v. Chicago & North Western Transportation Co., No. 82-1880 (8th Cir. December 3, 1982)— Petition For Stay

Dear Mr. Bator:

This responds to your request for the views of the Interstate Commerce Commission on the request of the Hayfield Northern Railroad Company to Justice Rehnquist for a stay of the court of appeals decision pending Hayfield's petition for a writ of certiorari.

The views set forth below are my own and not necessarily those of the commission. I have asked the Commissioners to notify me by close of business on February 18, 1983 whether they endorse my views and I will inform you as soon as they have completed voting.

I will address only one of the criteria that a court considers when deciding whether to issue a stay: likelihood of success on the merits.

The court of appeals found that 49 U.S.C. 10905—a provision of the Interstate Commerce Act, which is administered and enforced by the commission—preempts a state law condemnation for continued rail purposes of a rail line abandoned

pursuant to Commission authority. But the Commission consciously did not participate before the district court or the court of appeals in this case because neither the state law condemnation action nor preclusion of such an action affects the Commission's exercise of its power to regulate the abandonment of service, including the provisions of section 10905. The court of appeals correctly noted that that power is plenary and exclusive, citing *Chicago and North Western Trans. Co. v. Kalo Brink & Tile Co.*, 450 U.S. 311 (1981). Once abandonment has taken place pursuant to Commission authority, however, the Commission's interest in the rail line has ceased because the line has been found not to be required in interstate commerce.

The fact that the court of appeals decision does not affect the Commission's interests does not mean that other federal government agencies have no interest in the decision. The Department of Transportation may well have an interest because it provides subsidies and other assistance to enable state governments and their political subdivisions to continue rail service on lines that are about to be or have been abandoned. The court of appeals in this case has foreclosed one important means by which states may help to continue rail service without relying on federal subsidies—by allowing condemnation of abandoned rail lines for continued railroad use.

I believe that the court of appeals' holding presents a significant Tenth Amendment issue because it interferes with the State's choice of purposes for which it authorizes use of an integral governmental function—the power of eminent domain. The condemnation of rail lines for continued rail purposes under a state law is not to be confused with a state's running a railroad, which the Supreme Court has held is not an integral governmental function protected from regulation

by the Tenth Amendment. *United Transportation Union v. Long Island R. Co.*, 102 S. Ct. 1349 (1982). Moreover, the court's decision prevents a state from treating certain property within its borders the same as all other property (which is subject to condemnation) on the ground that the property once was a rail line regulated by the federal government.

I also believe that the conclusion of the court of appeals that Section 10905 precludes state law condemnation actions for continued rail purposes is not necessarily warranted. Under long-established precedent, the Supreme Court declines to find preemption of a state statute unless there is a clear conflict with a federal statute, *Kesler v. Department of Public Safety*, 369 U.S. 153, 172 (1962), and will attempt to reconcile the operation of both statutory schemes with one another, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

The court of appeals found preemption because the Minnesota state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Section 10905 (slip op. 5). The court largely was concerned that a state law condemnation action was a "protracted legal proceeding" that would undermine the strict time limit imposed in Section 10905 for purchases or subsidy agreements on lines about to be abandoned (*id.* at 7).

The "delay" inherent in a state law condemnation action does not necessarily harm a railroad because most condemnation statutes provide that the court may order the condemnor to post a bond during the pendency of the action. Therefore, even if a party such as HN has invoked the purchase or subsidy provisions of Section 10905 and then declined to fulfill the terms set by the Commission, at most the railroad will have "lost" 110 days—the statutory time during which any ar-

rangement under Section 10905 for continued rail service is to be completed (see slip op. 6). In a subsequent state law action, a condemnor such as HN will post a bond to compensate the railroad for any damages that the condemnation action should cause. And if a party never invokes Section 10905, but rather only seeks to condemn a rail line for continued rail use, then the railroad never suffers any uncompensated delay.

When Congress amended Section 10905 in the Staggers Rail Act of 1980, it shortened from six months to 110 days the period during which a potential purchaser or subsidizer negotiates with the railroad that is abandoning the line. Compare 49 U.S.C. (Supp. II) 10905(b) with 49 U.S.C. (Supp. IV) 10905(c)-(f). Congress indicated that the amendment "protect[ed] carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980).

The court of appeals interpreted the remarks of the Committee on Conference on the Staggers Act to means that carriers should be protected from a condemnation action after abandonment has occurred. I believe, however, that Congress referred to the six month proceedings under former Section 10905, during which the abandonment of a rail line was held in abeyance while an offeror and the railroad negotiated a subsidy or purchase price. Those proceedings delayed the abandonment. By contrast, the state law condemnation action at issue did not extend abandonment, which already had occurred when Hayfield filed the action.

Although I support generally the contention of counsel for HN that the court of appeals finding of preemption was not mandated, I do not agree with all of his analysis. In his letter to the Solicitor General (attached), counsel for HN states that

the decision of the Eighth Circuit finding preemption conflicts with *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 667 (7th Cir. 1982), in which the Seventh Circuit stated that a potential offeror under former Section 10905 "could . . . wait till the line was abandoned and then reacquire it [by eminent domain] at its nonrail value—or even condemn it before abandonment. . . ." I do not agree that there is a conflict. I agree with the court of appeals (slip op. 11) that the Seventh Circuit's language was dictum and does not show that the Seventh Circuit believes the opposite of the Eighth Circuit, *i.e.*, that state condemnation laws are consistent with the purpose of Section 10905. Moreover, the Seventh Circuit did not discuss the issue of federal preemption.

Similarly, there is no direct conflict between this decision and *Patrick W. Simmons v. ICC*, No. 81-2009 (D.C. Cir. December 14, 1982) (attached). In *Simmons*, the D.C. Circuit cited with approval (slip op. 10) the Commission's statement that it lacks jurisdiction to regulate a state's acquisition of an already abandoned rail line. That statement does not indicate any view of whether the the Commission's plenary jurisdiction over abandonments extends also to "provid[ing] for continuation of rail service in connection with abandonment," as the court of appeals found in this case (slip op. 7).

I do find a conflict in the philosophies of the *Simmons* decision and the court of appeals decision in this case, however, because the *Simmons* court recognized the willingness of state governments to "to undertake programs to retain local rail service" and that funding for such programs typically is "short term" (slip op. at 22). In this case, the court of appeals failed to consider an important state function when it found that a federal statute preempted one of the means by which

a state can help to retain local rail service after short-term funding is exhausted.

I also find a conflict between the court of appeals decision and the interest of the federal government (largely that of DOT) in encouraging states and their subdivisions to continue rail service that is not required in interstate commerce. In 1973, Congress enacted a federal entitlement program that allowed states and their subdivisions to continue rail service and provided loans for state acquisition and modernization of rail properties. Sections 401-403, Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 1010-1012. In 1976, Congress repealed those provisions and replaced them with a comprehensive local rail service assistance program including both entitlement funds and financial assistance. Sections 803, 805, 806, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 130-133, 139-143. See also, *Chicago & North Western, supra*, 678 F.2d 665. As the funds for such entitlement programs diminish in an era of fiscal restraint, the states will depend more on condemnation as a means to continue rail service.

Sincerely yours,

JOHN BROADLEY

General Counsel

APPENDIX R

GOVERNMENTAL AFFAIRS
OFFICE OF THE CHAIRMAN
TO: Distribution List
FROM: Bruce Hatton
DATE: February 25, 1983
SUBJECT: Hayfield Northern R.R. Company

Recently, you wrote to us about the subject railroad, asking that the ICC support the State of Minnesota's position. Enclosed, for information, is a copy of a letter which our General Counsel has sent to the Solicitor General in regard to this case. This letter has been approved by the Commission.

Ref: Your letter of December 17, 1982 & February 3, 1983.

Distribution List:

Honorable Russell Long
Honorable Rudy Boschwitz
Honorable Dave Durenberger
Honorable Bill Frenzel
Honorable Martin O. Sabo
Mr. Warren B. Dunham

APPENDIX S

Art. 8 § 10. Internal improvements

Section 10. The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways or the development, improvement and construction of airports or other aeronautical projects or the acquisition, improvement or construction of veterans' housing or the improvement of port facilities. Provided, that the state may appropriate moneys for the purpose of acquiring, preserving and developing the forests of the state; but of the moneys appropriated under the authority of this section in any one year an amount not to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment may be raised by a tax on property.

(As amended April 1960; April 2, 1968).

APPENDIX T

85.09 Acquisition of abandoned property

(1) Definitions. As used in this section:

(a) "Railroad" has the meaning designated under s. 195.02 (1).

(b) "Railway" means a corporation described in s. 193.01.

(c) "State agency" means state departments and independent agencies.

(d) "System diagram map" means the map required under federal law to be filed with the department by the railroad operating in this state that indicates rail lines in the process of abandonment, rail lines the railroad expects to abandon and the rail lines that are under study by the railroad for possible abandonment in the future.

(2) First right of acquisition. The department shall have the first right to acquire, for present or future transportational, recreational or scenic purposes, any property used in operating a railroad or railway including * * * *land* and rails, ties, switches, trestles, bridges and the like located thereon, which has been abandoned. Acquisition may be by gift, purchase or condemnation in accordance with the procedure under s. 32.05. No person owning such abandoned property, including any person to whom ownership reverts upon abandonment, may convey or dispose of any abandoned property without first obtaining a written statement from the department indicating that it does not intend to exercise its right to acquire the property. No railroad or railway may convey any such property prior to abandonment if that property is part of a rail line shown on the railroad's system map as in the process of abandonment, expected to be abandoned or under study for possible abandonment unless the conveyance or disposal is for

the purpose of providing continued rail service under another company or agency. Any conveyance made without obtaining such release is void. The department's first right of acquisition under this subsection does not apply to any railroad property declared by the department to be abandoned before January 1, 1977. The department may acquire any abandoned property under this section regardless of the date of its abandonment.

(3) Determination of abandonment. For purposes of this section, railroad or railway property shall be deemed abandoned if *one of the following paragraphs applies*:

(a) A certificate or approval of abandonment has been issued by the interstate commerce commission or any other federal or state agency having jurisdiction over the abandonment of * * * *the* property and operations have been terminated in accordance with the certificate or approval * * *.

(b) * * * *A* certificate or approval of abandonment is not required and the use of * * * *the* property for railroad or railway purposes has been discontinued with the intent not to resume. Intent not to resume may be inferred from circumstances including, but not limited to, the following:

1. If the property is not used for railroad purposes for 2 consecutive years.

2. If the facilities on the property are removed or rendered unfit for service.

3. If the property is used for other than railroad purposes.

(c) A federal bankruptcy court or trustee declares the property to be excess to a reorganizable rail system and offers it for sale.

(4) Acquisition and conveyance. Upon its own initiative, the department may determine at any time whether the property of the railroad * * * is abandoned, and whether it is in

the best interest of the state to acquire such property. Within 90 days after being requested by any state agency, any railroad * * * or any county or municipality in which the property is located, the department shall, *subject to sub. (5)(b)*, make a determination of the abandonment status and, if found to be abandoned, shall determine whether it is in the best interest of the public to acquire the property. If it is determined to acquire the property or any part or interest therein, the department shall, within 180 days of the determination of its abandoned status, or the interstate commerce commission's final order permitting the abandonment, or the termination of any efforts to negotiate an agreement for continual operation of rail service on the line, whichever occurs last, determine the fair market value of the property and acquire the property at a price deemed reasonable by the department or make a relocation order under s. 32.05. In making its determination, the department shall consider long-range potential for use of such property for restoration of railroad service and for * * * *other transportation related purposes.* The department shall solicit the opinions of appropriate state agencies, affected counties and municipalities and other interested persons. The department shall give due consideration to an expressed desire by a state agency or an affected county or municipality to acquire, in whole or in part, the property under consideration. * * * *Subject to sub. (6), all* or part of any interest in abandoned property acquired by the department under this section or under s. 66.941(7), 1975 stats., may be subsequently conveyed to another state agency or a county or municipality for transportational, recreational or scenic purposes, *or to a railroad for continued railroad transportation operations when the railroad has operated on the property for 5 years* and the department may make such conveyances for such purposes.

Any determination of the department under this section that property is not abandoned shall not preclude the undertaking of a subsequent investigation and determination concerning the same property or any portion thereof. If at any time subsequent to the acquisition of property under this section the department determines that the property is not suitable for transportational, recreational or scenic purposes, or that the property or any interest therein may be conveyed to any other person on terms which are not inconsistent with the potential use of the property for transportational, recreational or scenic purposes or which yield a benefit, including financial benefits, to the state which outweighs the benefit derived from the property if used for transportational, recreational or scenic purposes, the department may convey the property or such interest therein, *subject to sub. (6)*. The department shall give notice of its intention to make the conveyance, and state and local units of government shall have the first 6 months in which to exercise their opportunity to acquire the property or interest therein. The railroad * * * from which the property was acquired shall have the next 6 months in which to exercise * * * *its* opportunity to * * * *reacquire* the property or interest therein. * * *.

(5) Duties of railroads and others. (a) Any railroad which places a rail line or portion of a line on a system diagram map shall within 60 days of such action provide to the department one legible copy of each map in the railroad's possession which shows property boundaries or engineering stations for the line involved. At the same time the railroad shall provide to the department all other pertinent information in its possession requested by the department relating to the title to the property covered by the line involved. The department shall determine the reasonable cost to the railroad of provid-

ing documents and information under this paragraph and shall reimburse the railroad in this amount. Any conveyance by the railroad made without providing the information required by this paragraph is void.

(b) Any state agency, railroad, county or municipality which requests the department to make a determination of abandonment status and public interest in acquisition of property under sub. (4) shall provide a formal legal description of the property which is the subject of the request. The department may decline to take action on requests which do not contain an adequate description of the property involved. When the department provides a release of its first right to acquire property, the state agency, railroad, county or municipality which receives the release shall within 90 days have the release recorded by the register of deeds for each county in which the property is located.

(6) State rights subordinate to federal law. To the extent that the first or subsequent rights of acquisition under this section conflict with rights conferred by 49 USC 10905(f)(4) or 10910(h), the rights conferred by this section are subordinate to such federal rights and shall take effect only when consistent with 49 USC 10905(f)(4) and 10910(h).

(7) Rules. The department may adopt such rules as it deems necessary to accomplish the purposes of this section.

[Wis. Stat. Ann. (West 1982)]